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717-480—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 634

AMERICAN STEVEDORES, INC., PETITIONER

v.

MAXWELL SHENKER AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15–34) is reported at 322 F. 2d 622. The opinions of the district court (Pet. 35–46, 47–54) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1963. Petitioner's timely petition for a rehearing *en banc* was denied on September 16, 1963. The petition for a writ of certiorari was filed on November 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a shipowner warrants the seaworthiness of its vessel to a stevedore's shore-based clerical employee who keeps records for use in billing the shipowner for the stevedore's services.

2. Whether the stevedore was obligated by the terms of its contract with the shipowner (the United States) to indemnify the shipowner for losses sustained as a result of the injury to the stevedore's employee.

CONTRACTUAL PROVISION INVOLVED

Clause 12 of the contract between petitioner and the United States provided in pertinent part (Pet. 48):

> Clause 12. Liability and Insurance.
> a. The Contractor
>
> * * * * *
>
> (2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for * * * bodily injury to * * * persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees, in the performance of work under this contract. The general liability and responsibility of the Contractor under this Clause are subject only to the following specific limitations.
>
> b. The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to * * * bodily injury to * * * persons:
>
> (1) If the unseaworthiness of the vessel * * * furnished by the Government contributed

jointly with the fault or negligence of the Contractor in causing such * * * injury * * * and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness * * * or through the exercise of due diligence could not otherwise have avoided such * * * injury * * *.

(2) If the * * * injury * * * resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents, or employees of the Contractor with specific directions of the Contracting Officer.

STATEMENT

The basic material facts, as found by the district court (Pet. 35–36, 38–42, 45–46, 48–50), are not in dispute. On May 28, 1957, the SS Lt. ROBERT CRAIG, a naval vessel owned by the United States and operated by the Military Sea Transportation Service, was moored to a pier at the Brooklyn Army Terminal in New York. Petitioner, American Stevedores, Inc., had a contract with the government to discharge and load the vessel's cargo. The contract contained an indemnity clause under the terms of which petitioner agreed to indemnify the government for any loss for bodily injury or death occasioned in whole or in part by the negligence or fault of its employees in the performance of the contract.

Respondent Shenker was a time and record keeper employed by petitioner; with his "office" in a cubicle ashore (Pet. 36). He kept activity records in order

to enable petitioner to compute its "costs and profits." (Pet. 5). Much of his work could be completed within his office; on the three working days preceding the accident he had not gone aboard the vessel (Pet. 5, n. 3).

On May 28 Shenker's superior instructed him to ascertain whether the stevedores aboard the CRAIG would quit work before or after 5 p.m. that afternoon. After failing to receive an answer to his telephone calls to the vessel, Shenker went aboard the CRAIG to obtain the information from the foreman in charge (Pet. 36). He met the foreman aboard the CRAIG and talked to him while both stood on a battened-down hatch. After the conversation, the two men walked across the hatch, which stood approximately 40 inches above the deck. When they arrived within a few feet of the edge, Shenker stumbled over a plank of wood and fell onto the deck (Pet. 39–41).[1] The plank was four feet long, a foot wide, and an inch thick, and had been in plain sight (Pet. 41). As a result of the fall, Shenker sustained substantial injury to his neck (Pet. 46).

He then brought this action against the United States under the Public Vessels Act, 46 U.S.C. 781–790, alleging that the CRAIG was unseaworthy, and that the government's employees were negligent. The United States impleaded petitioner as a third-party defendant, claiming indemnity under the stevedoring contract.

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[1] The only factual dispute in the case surrounds the circumstances of this fall. See Pet. 4, note 1. The court of appeals accepted the finding made by the district court (Pet. 19), which was supported by the testimony of the foreman.

After a trial, the district court found that the presence of the plank on the hatch rendered the CRAIG unseaworthy (Pet. 40–41, 42–45), and that Shenker was entitled to the benefit of the shipowner's warranty of seaworthiness (Pet. 37). The court also found (1) that the United States had not been negligent, (2) that Shenker had been contributorily negligent in not being alert, and (3) that damages amounted to $25,000 (Pet. 45–46). The court reduced the damage award by one-half by reason of Shenker's own negligence, and entered judgment for $12,500 (Pet. 46).

On the government's indemnity claim, the district court found that the foreman had also been at fault in failing to notice the plank in time to warn Shenker (Pet. 52–53). Accordingly, it held that petitioner was liable to the government under the terms of the indemnity provision because of the negligence of the foreman (Pet. 51–54), and of Shenker himself (Pet. 49–50). The court of appeals affirmed by a divided vote, Judge Friendly being of the view that the warranty of seaworthiness did not extend to one in Shenker's position and that, in any event, the presence of the plank did not render the CRAIG unseaworthy (Pet. 15–34).

ARGUMENT

This case involves the application of well-settled principles of admiralty and contract law to particular facts and circumstances. Consequently, although we disagree with the ruling of the district court and the court of appeals on the first issue—*i.e.*, the reach of the warranty of seaworthiness—we do not believe

that the question presented in this case is of sufficient importance to warrant review by this Court. On the second issue—the applicability of the indemnity provision in the stevedoring contract—the courts below correctly construed the provisions of the contract and granted indemnity. Hence further review by this Court is unnecessary.

1. The shipowner's warranty of seaworthiness extends only to those who engage in "'the type of work' traditionally done by the ship's crew." *United Pilots Association* v. *Halecki*, 358 U.S. 613, 617. See also *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 90, 96; *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 412–413. On the facts of this case, we agree with Judge Friendly's conclusion that "[t]he records that Shenker was keeping were not the kind of records historically kept by the ship's crew; rather they were the very kind that would not have been kept if the ship's crew had carried out their supposed historical function of loading her" (Pet. 33). However, since the correctness of the conclusion reached by the courts below turns entirely on the application of a well-established principle to the facts of this case, we do not believe that further review by this Court is justified.

2. The stevedoring contract obligated petitioner to indemnify the government for "liability and expense for * * * bodily injury to * * * persons occasioned either in whole or in part by the negligence or fault of [petitioner], his officers, agents, or employees" (p. 2, *supra*). The unchallenged findings of the district court and the court of appeals that Shenker's

injury was caused, at least in part, by the negligence of the foreman, who was one of petitioner's employees, rendered petitioner liable under the express language of the indemnity clause. See *Santomarco* v. *United States*, 277 F. 2d 255 (C.A. 2), certiorari denied *sub nom. American Stevedores, Inc.* v. *United States*, 364 U.S. 823, which involved the construction of an identical indemnity provision under analogous circumstances. Petitioner's contention that the foreman owed no legal duty to Shenker (Pet. 13–14) is without merit since liability under the indemnity provision is not based on tort principles but on the voluntarily assumed contract obligation to hold the shipowner harmless for any liability "occasioned" by the negligence of petitioner's employees. Consequently, this contractual liability attaches if (1) the shipowner has been held liable for damages arising out of an injury and (2) the negligence of petitioner's employee has been a cause in fact of such injury.[2]

3. The courts below alternatively held that Shenker's *own* contributory negligence rendered petitioner liable under the indemnity provision because Shenker was petitioner's employee. Petitioner contends that this portion of the court of appeals' decision conflicts

[2] Even without the express indemnity provision of the contract, petitioner would probably be liable to indemnify the United States under general principles of maritime law, since a stevedore is liable in indemnity for the failure of its employees to use reasonable care in performing the work of the contract. *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423; *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563; *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124.

with the decision of the Fifth Circuit in *Drewery v. Daspit Bros. Marine Divers, Inc.*, 317 F. 2d 425. Whether or not a conflict exists on this point—and we suggest that the cases are distinguishable because of the difference in contract provisions—this aspect of the decision was unnecessary to the result reached by the courts below. The court of appeals observed that, "in any event, there is no difficulty for purposes of establishing indemnity liability in the present case in imputing the negligence of [the foreman] to his employer, American Stevedores" (Pet. 27). Accordingly, there is no occasion for this Court to consider the validity of the alternative holding that the injured employee's own negligence gave rise to the right of indemnity.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 634

MAXWELL SHENKER,

Libelant-Respondent,

against

UNITED STATES OF AMERICA,

Respondent,

and

AMERICAN STEVEDORES, INC.,

Petitioner-Appellant.

LIBELANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No.

MAXWELL SHENKER,

Libelant-Respondent,

against

UNITED STATES OF AMERICA,

Petitioner-Appellant,

against

AMERICAN STEVEDORES, INC.,

Petitioner.

LIBELANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Libelant, Maxwell Shenker, opposes petitioner's prayer that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed August 21, 1963, and the denial of said petitioner's petition for rehearing and rehearing *in banc*, without opinion, filed on September 17, 1963, in so far as said decision and judgment affirmed the decree entered in the United States Court for the Eastern District of New York on October 2, 1962, which, in a marine personal injury case, found in libelant's favor against respondent, the shipowner, by reason of unseaworthiness of its vessel, and further granted the said respondent a full indemnity over against petitioner, the contracting stevedore.

Questions Presented

Relative to the warranty of seaworthiness issue

1. Has the doctrine of the warranty of seaworthiness application to an employee of a stevedoring company engaged in the loading of a vessel prior to voyage, when the presence of said employee on board said vessel is an integral and necessary part of the maritime activities of the stevedores loading the vessel, to whom the doctrine clearly applies?

Relative to the indemnity issue

2. Does a contract provision which imposes liability on the contractor for damages sustained by the government as a result of the negligence or fault of the Contractor or his employees apply where the government is called upon to respond in money damages because of the fault of the contractor's employees?

Statement of the Case

Libelant is a timekeeper employed by petitioner (41a[1]) whose duties included the keeping of payroll records for longshoremen gangs (41a), running the activity of loading and discharging cargo (42a), keeping a check on the opening of hatches, rigging, starting, opening the 'tween decks or going down to the lower hold (42a) and recording the stowage of cargo in different compartments of a hatch (45a). These duties required libelant to board ship in order that they be properly executed and he customarily went aboard ship twice each day (44a).

Libelant's duties did not only benefit his employer and respondent shipowner, but were in fact required by his

[1] Numbers followed by the letter "a" refer to pages in Appendix to Petitioner's brief in the Court of Appeals.

employer's contract with respondent. These duties were required to be performed in order that respondent be supplied with reports relative to cost time and activity data concerning the loading and unloading operations the petitioner stevedore had undertaken to perform (245a-247a).

On May 28, 1957, at about 1:30 P.M., libelant went aboard the "Craig" to obtain certain information about the cargo operations then going on (47a). To obtain this information it was necessary for libelant to consult with Domenic Judice, one of the foremen in charge of the stevedores (47a).

Once on board ship and after spotting Judice, libelant was beckoned by Judice to mount the No. 2 hatch (48a). Libelant mounted the hatch (50a) as did Judice (49a) and the two met near the center of the hatch to discuss the cargo loading operation (51a; 76a).

After completing their conversation and while proceeding to get off the hatch, libelant stubbed his toe on a piece of dunnage (a plank of wood) lying on the hatch (52a) and stumbled and fell off the hatch (53a).

The trial court found that the vessel was unseaworthy as follows:

> "The piece of wood had been a random object, not serviceable as dunnage for any stevedoring use. Its presence on the hatch was left unaccounted for. A danger, not integral to the necessary operations of ship, was thereby created. In such circumstance and to that extent the vessel was rendered unseaworthy." (25a).

The trial court also found that libelant was entitled to the warranty of seaworthiness because his presence aboard, being within the range of his duties and neither unusual or unreasonable under the circumstances, "was an integral participant in the maritime activities of

the stevedores and assimilated their status as of a person engaged in the ship's service" (19a).

The trial court further found that since the fault of libelant and Judice contributed to the accident that pursuant to the provisions of its contract, petitioner was liable to indemnify respondent (33a, 35a, 36a).

These findings were affirmed by the Court of Appeals (45-34).

Reasons for Disallowance of the Writ

The decision of the courts below in no way conflicts with any decision of this Court pertaining to the warranty of seaworthiness.

Petitioner contends that *United N. Y. & N. J. S. H. Pilots Assn. v. Halecki* (358 U. S. 613), is in direct conflict with the decisions below. An examination of that case reveals the manifest error of petitioner's position.

This Court in the *Halecki* case, *supra*, following the rationale of its decision in *Sears Shipping Co. v. Sieracki* (328 U. S. 85), held that an employee of an electrical subcontractor of a shipyard engaged in the overhaul of a vessel, who was injured while spraying the ship's generators, was not covered by the doctrine of seaworthiness. Mindful that the doctrine applies only to those engaged in the ship's service, this Court found that the work performed by Halecki could not rightfully be classified as work traditionally done in furtherance of the maritime service of the vessel. The factors considered of prime importance to the court in arriving at this decision were several. As the ship was in dry dock for overhaul it was not ready for sea. The work being performed was not historically performed by the ship's crew. Indeed,

Numbers refer to pages in Petition for Writ of Certiorari.

the crew could not perform such work as it was of such a specialized nature that the overhauling shipyard had to subcontract the work to an electrical specialist, and the equipment needed for the job had to be brought on board from shore. Furthermore, "(a) measure of how foreign was the decedent's work to that ordinarily performed by the ship's crew is that it could be performed only at a time *when all the members of the crew were off the ship.*" 358 U. S. 613 at 618." (Emphasis supplied.)

In the instant case, the ship was in navigable waters and was being loaded for a voyage (169a). Libelant was aboard ship in connection with the cargo loading operations (47a). Clearly, the factors which influenced this Court in the *Halecki* case, *supra*, are absent here. The determination of the lower courts that libelant was engaged in the ship's service is reasonable under the circumstances and in no way conflicts with the decision in *Halecki, supra.*

The guidelines for determining who is within the scope of the warranty of seaworthiness were set down in the decision of this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85. In that case, this Court found that a stevedore, who, while loading cargo, was injured, was covered by the warranty. The court reasoned that all persons engaged in the ship's service were covered by the warranty and cargo operations were within the ship's service. The fact that the injured party was not directly employed by the shipowner was found of no consequence. That the shipowner seeks to have the ship's work done with the advantages of modern division of labor does not minimize the worker's hazard. Liability arises as an incident not of contract but of performing the ship's service. Said the Court:

> "All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers

> whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection." 328 U. S. 85 at 95.

In the instant case, not only was libelant's work related to the ship's service, but it was required, in effect, by the provisions of petitioner's contract with respondent calling for submission of reports concerning time and activity data (245a-247a). To find the warranty inapplicable here, would be directly contrary to the rationale of the *Sieracki* case, *supra*, and would in fact permit shipowners to absolve themselves from liability by doling out the ship's work and taking advantage of modern division of labor. Clearly, not everyone can physically handle cargo, but, it is absurd to contend that those whose work is an integral part of the cargo operation and whose duties require their presence on board ship and expose them to the hazards sought to be protected against, are not covered by the humanitarian doctrine of the warranty of seaworthiness, merely because they physically do not handle cargo.

Whether a particular occupation is within the ship's service is a question of fact to be separately determined in each case. *Lawlor* v. *Socony Vacuum Oil Co.*, 275 F. 2d 599 (CA 2 1960), cert. den'd 363 U. S. 844). The decisions in this area are not conflicting but rather indicate that a variety of factors are considered in determining the nature of an individual's work. Thus, a watchman guarding a ship, in dock, injured while on board the ship, is covered by the doctrine (*Ross* v. *The S. S. Zeeland*, 240 F. 2d 820 (CA 4 1957)), but, a boom tester of an independent testing company, testing a boom pursuant to a standard which prescribes that the test be not made by a member of the crew, is not covered (*Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734 (CA 2 1958), cert. den'd 359 U. S. 927).

The courts below, with ample support in the record, have found that libelant was engaged in the ship's service and therefore covered by the warranty of seaworthiness.

Petitioner now apparently concedes that an unseaworthy condition existed and this question has not herein been explored. Suffice it to say that a transitory condition may constitute unseaworthiness (*Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539) and both courts below found that the condition which caused the accident rendered the ship unseaworthy.

In view of the fact that the decisions below are in full accord with the rationale of the *Sieracki* case, *supra*, and not in conflict with any decisions of this Court or of any lower court, and fully supported by the record, it is respectfully submitted that no basis exists for the granting of the writ sought herein.

As to the indemnity issue

The petitioner's contract with respondent provides that petitioner will indemnify the government for loss "occasioned either "in whole *or in part* by the negligence *or fault* of the Contractor, his officers, agents, *or employees* . . ." (emphasis supplied) except where unseaworthiness is a cause of the loss jointly with the fault or negligence of the contractor, and "the Contractor, its officers, agents, *and employees*, by the exercise of due diligence, could not have discovered such unseaworthiness . . ., or . . . could not otherwise have avoided such damage, injury, or death" (251a-252a). (Emphasis supplied.)

These provisions, as found by the courts below, are quite explicit and do not base indemnity on negligence alone (the contract speaks of "negligence *or fault*") and do not limit the fault or negligence covered to specific employees.

As found below, the fault of petitioner's employees contributed to the accident and the exercise of due diligence

could have discovered the defective condition or avoided its consequences (28a, 35a, 27).

It is respectfully submitted that the case of *Drewery v. Daspit Bros. Marine Divers, Inc.* (317 F. 2d 425 (CA 5, 1963)), relied upon by petitioner, is not in conflict with the decision below. The contract construed in the *Drewery* case, *supra*, did not modify the word "contractor" with the phrase "or its employees" or its equivalent as is so in the contract now before this Court. As a result, in determining what constituted negligence on the part of the contractor the court in that case felt constrained to consider the common law concepts of imputed negligence.

It is not now necessary to consider whether these common law concepts support the finding below since in the instant case the contract is clear and the warranty express. The language used aptly covers the situation presented and there is nothing unjust in holding petitioner to its bargain.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court deny petitioner's application for a writ of certiorari to review the judgment and decree herein of the United States Court of Appeals for the Second Circuit.

Respectfully submitted.

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